

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD SLEZAK,

No. C-05-3537 MMC

Plaintiff,

**ORDER RE: BRIEFING ON
DEFENDANTS' MOTION TO DISMISS**

v.

TCIF, et al.,

Defendants

Before the Court is the motion, filed April 13, 2006 by defendants TCIF LLC ("TCIF") and Select Portfolio Servicing, Inc. ("SPS"), to dismiss plaintiff Richard Slezak's First Amended Complaint ("FAC"). By order filed May 3, 2006, the Court took the matter under submission on the moving papers, no opposition having been filed. On May 5, 2006, however, plaintiff filed opposition, requesting that such filing be considered although admittedly untimely.

At the outset, the Court notes that this is not the first instance in which plaintiff has filed documents on an untimely basis and sought consideration thereof without showing good cause to excuse the untimeliness.¹ In light of such past conduct, further untimely

¹A review of the record of the instant action and of a prior related action reveals a number of such instances. On March 2, 2006, in the instant action, plaintiff filed untimely opposition to SPS's motion to dismiss the initial complaint. Although plaintiff did not offer good cause to excuse the untimeliness, the Court considered the opposition. In the prior related action, Slezak v. IndyMac Bank FSB, et al., C 03-0650 MMC, after plaintiff failed to file timely opposition to two motions to dismiss, the Court vacated the scheduled hearing, whereafter plaintiff belatedly filed opposition; although the Court did not find any good

1 filings by plaintiff could well be considered deliberate in nature, thus warranting the
2 imposition of monetary sanctions in addition to the striking of such documents.
3 Nevertheless, in this instance, the Court will consider plaintiff's opposition. There appears
4 to be little or no prejudice to defendants if the Court does so, provided defendants are
5 given an extension to file a reply. Indeed, as noted below, further briefing could be of
6 assistance to all parties with respect to resolving a threshold issue presented by plaintiff's
7 claims.

8 The claims alleged by plaintiff in the FAC are based on the following allegations:
9 (1) on August 3, 2001, plaintiff executed a deed of trust and promissory note with respect to
10 the subject real property in favor of IndyMac Bank ("IndyMac"), and such documents were
11 publicly recorded on August 23, 2001 with the San Francisco County Recorder; (2) in
12 November 2004, plaintiff and IndyMac entered into an agreement whereby IndyMac
13 discharged plaintiff from any obligations he had to IndyMac, and such agreement was
14 publicly recorded in December 2004; (3) on March 16, 2005, SPS, acting on behalf of TCIF,
15 publicly recorded a document stating that TCIF had been assigned a security interest in the
16 subject real property;² and (4) IndyMac, in response to inquiries made by plaintiff, has
17 advised plaintiff that IndyMac has not located a record of its having assigned an interest in
18 the subject real property to TCIF. Based on allegations that SPS "forged" the assignment
19 recorded in 2005, (see FAC ¶ 13), and that SPS has engaged in other wrongful conduct
20 with respect to plaintiff's real property, (see FAC ¶¶ 9-12), plaintiff seeks damages from
21 SPS. With respect to TCIF, plaintiff seeks a declaration that TCIF does not have an
22 interest in the subject real property, as well as injunctive relief requiring transfer of title and
23 possession to plaintiff.

24 In their motion to dismiss, defendants argue that because the FAC does not allege
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26 cause to excuse that untimely filing, the Court considered the opposition. (See Order, filed
27 October 7, 2003.)

28 ²Plaintiff does not identify the individual or entity from whom TCIF claims to have
received the assignment.

1 TCIF itself “forged” the assignment or otherwise engaged in wrongful conduct, plaintiff fails
2 to state a claim against TCIF. As noted, however, plaintiff seeks only declaratory and
3 injunctive relief against TCIF, in each instance based on a claim that TCIF’s assignment is
4 invalid because the underlying security interest previously had been discharged by
5 IndyMac. Consequently, it does not appear that TCIF is entitled to dismissal, at least on
6 the ground set forth in defendants’ moving papers.

7 Defendants additionally argue that the claims against SPS should be dismissed, on
8 the ground that the FAC alleges SPS’s conduct constitutes a breach of SPS’s obligations
9 under a settlement agreement approved by the United States District Court for the District
10 of Massachusetts in the matter of Curry v. Fairbanks Capital Corp., C 03-10895 DPW.
11 (See FAC first ¶ 3.) In particular, defendants rely on a provision in the Curry settlement
12 agreement requiring claims to enforce the agreement be filed in the District of
13 Massachusetts. As plaintiff points out in his opposition, however, plaintiff’s allegation that
14 SPS breached its obligations under the Curry settlement agreement is, at most, made in
15 the alternative to his allegation that the TCIF assignment is invalid. (See Pl.’s Opp. at 3:4-
16 6; FAC ¶ 8 (“If there had been a valid deed of trust/ promissory note, SPS would have
17 grossly violated numerous provisions of the “Curry Agreement.”) (emphasis added).)
18 Because defendants do not articulate a basis for dismissing the claims against SPS to the
19 extent such claims are premised on the theory that the assignment is a forgery, it does not
20 appear that SPS would be entitled to dismissal of all claims alleged against it.

21 Nevertheless, it is apparent that plaintiff’s claims present a threshold issue,
22 specifically, whether in November 2004, when IndyMac discharged plaintiff from any
23 obligations plaintiff had to IndyMac, IndyMac in fact held an interest in the subject real
24 property. It may well be that documents resolving such threshold issue exist and are the
25 proper subject of judicial notice. See, e.g., Hotel Employees and Restaurant Employees
26 Local 2 v. Vista Inn Management Co., 393 F. Supp. 2d 972 (N.D. Cal. 2005) (taking judicial
27 notice of deeds recorded with San Francisco Assessor-Recorder’s Office); Fed. R. Evid.
28 201(b) (providing district court with discretion to “take judicial notice, whether requested or

1 not"). For example, there may exist recorded documents reflecting the dates on which
2 IndyMac held a security interest in the subject real property, the participants in the transfer
3 of any security interest in the subject real property to TCIF, and the settlement agreement
4 between IndyMac and plaintiff, all of which could be submitted in the form of certified
5 copies.³

6 Accordingly, the Court hereby GRANTS plaintiff's request that his opposition to the
7 motion to dismiss be considered, and AFFORDS defendants the opportunity to file, no later
8 than June 9, 2006, a reply. Unless the Court directs otherwise, the motion will stand
9 submitted as of June 9, 2006.

10 **IT IS SO ORDERED.**

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12 Dated: May 16, 2006

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MAXINE M. CHESNEY
United States District Judge

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³In its motion to dismiss the initial complaint, SPS stated: "IndyMac [] sold [plaintiff's]
26 loan to Truman Capital on January 31, 2003 [and] [a]ccordingly IndyMac did not own the
27 loan [in November 2004], and therefore had no ability to discharge it by virtue of the
28 settlement agreement between IndyMac and [plaintiff]." (See SPS's Mot. to Dismiss, filed
February 2, 2006, at 4:22-27.) SPS, however, did not attempt to establish such facts at
that time, apparently because it could not discern from the initial complaint the theory
plaintiff was advancing to challenge TCIF's interest in the subject real property.